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[Mandreger v. Detroit Edison Co.](#), 88-ERA-17 (Sec'y Mar. 30, 1994)

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DATE: March 30, 1994
CASE NO. 88-ERA-17

IN THE MATTER OF

JAMIE H. MANDREGER,

COMPLAINANT,

v.

THE DETROIT EDISON COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Before me for review is the Recommended Decision and Order (R.D. and O.) of the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ recommended dismissal of the complaint because Complainant Jamie Mandreger did not establish that his activities protected by the ERA motivated the adverse actions that Respondent Detroit Edison Company (Detroit Edison) took against him. Although I agree with the ALJ's conclusion, I write to clarify the elements of a prima facie case and the burdens of production and persuasion.

At the outset, I commend and adopt the ALJ's exhaustive findings of fact, R.D. and O. 3-8, and analysis of the testimony. R.D. and O. 8-51. The six day hearing resulted in nearly 1,500 pages of transcript and included the introduction of numerous documents. A brief recitation of the facts will focus the discussion.

I. The Facts

Mandreger began working for Detroit Edison in 1983 and

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voluntarily transferred to a position in the maintenance section of its Fermi 2 nuclear power plant in May 1987. R.D. and O. at 3; T. 53-56. The next month, Mandreger was told to throw away some new equipment that was in storage, and he informed his supervisor, John Sutka, that he would be willing to write a

proposal to save Detroit Edison from such an expense in the future. T. 65. According to Mandreger, Sutka replied that the idea was "a good way to find yourself in cement shoes at the bottom of a river." T. 66. [1] Although he felt threatened, Mandreger did not report the statement to any authority because he was in his probationary period at Fermi 2 and was afraid of being sent back to his former position. T. 219.

Mandreger made several suggestions to managers in October and November, 1987, but Detroit Edison did not address them. R.D. and O. at 3; T. 69-71. On December 4, 1987, Mandreger complained to his supervisor, Don Gardner, and a union steward about leaking gauges that were labelled "internally contaminated" with radiation and had been left in the "clean" portion of the hot tool crib area in which Mandreger was working. T. 74, 239. While Gardner was elsewhere seeking an explanation of the leaking gauges, a health physics technician frisked the gauges to measure radiation and told Mandreger not to move them until they were found to be clean. T. 75-76; CX 1 p.1. Gardner returned, told Mandreger to move the gauges, and Mandreger refused because of the direction from the health physics technician. T. 75.

Gardner overheard Mandreger tell the union steward that if forced to, he would go to the Nuclear Regulatory Commission (NRC) about the gauges. T. 76, 84. Mandreger promptly spoke with the secretary of the on-site NRC official and informed her that he was making a complaint. T. 78.

Later the same day, Mandreger saw Sutka about a different matter. Mandreger claims that Sutka brought up the NRC and told him that going to the NRC "makes us look bad" and would not solve the department's problems. T. 80; CX 1 p.1. Sutka admitted that he asked Mandreger about the problem at the hot tool crib, but said that he did not mention the NRC during the conversation, and did not recall Mandreger's mentioning it either. T. 1387, 1414.

Mandreger discussed the leaking gauges issue with his wife the weekend of December 5-6. T. 405, 426. Mrs. Mandreger helped him prepare a lengthy typewritten report, T. 81, 425-426, CX 1, which Mandreger submitted to the NRC on Monday, December 7, 1987. T. 88. The leaking equipment was no longer in the same storage area when Mandreger reported to work on December 7. An NRC inspector visited Mandreger to discuss the report that day. T. 89.

According to Mandreger, a series of incidents of intimidation and harassment occurred after he complained to the

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NRC. For example, Gardner purportedly told Mandreger that he should not have reported to the NRC because Detroit Edison would have solved the problem. T. 96. Gardner admitted that he saw Mandreger speak with the NRC official and that after the official left, he asked Mandreger what the conversation was about. T. 751-752. Gardner testified that it was possible that he made the statement about the NRC, although he did not recall doing so. T. 753, 807. Another worker who overheard part of the conversation between Mandreger and Gardner did not hear Gardner make the alleged statement about the NRC. T. 852-853 (Greg Osmulski).

Mandreger noticed that whereas prior to December 7, supervisors sent clerks to perform periodic checks of the area in

which he worked, after that date the supervisors made such checks themselves. T. 102-103. Mandreger felt he was being watched closely by his managers. T. 102, 274-176, 279, 408.

At Mandreger's request, Vincent Piersante, an independent management consultant hired by Detroit Edison, met with him on December 9, 1987. T. 926-927. Piersante had interviewed witnesses often as the former chief of detectives for the Detroit Police Department, and testified that Mandreger's conversation was incoherent and his comments were not substantive. T. 955-956. According to Piersante, Mandreger seemed distrustful and frustrated because he believed that people were not listening to him or doing anything to correct his complaints. T. 946, 956-957. In a written memorandum that he gave to the director of nuclear security at the plant, T. 962, Piersante reported his concern that Mandreger "may be on the verge of an explosion" and suggested "that some means of communication be taken to allay his fears." RX 15, p. 2; T. 934, 964.

A few weeks later, as Gardner concluded a briefing session for tool and warehouse workers on new procedures for the hot tool crib, he asked Mandreger (and no one else present) if he had any more questions. T. 103. Mandreger felt singled out. *Id.* Gardner explained that Mandreger had asked several questions during the session that revealed he did not understand the information. T. 754, 811. The health physics technician at the session noted that Mandreger seemed frightened and corroborated that Mandreger asked several questions during the meeting. T. 972-973.

At about the same time that the NRC began its formal investigation of Mandreger's complaint, Detroit Edison reassigned Mandreger to a position unloading trucks at Warehouse A of the plant. T. 109. Mandreger conceded that he knew the hot tool crib assignment was not permanent. *Id.* All maintenance and modification department personnel received new assignments at that time. T. 375-376.

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In early January, 1988, a nonsupervisory employee, Greg Osmulski, told Mandreger that "the best thing you could have ever done was [go] to the NRC. Things are really changing around here, I'm glad to see that going on." T. 104. Mandreger took Osmulski to be speaking sarcastically, *id.*, but Osmulski testified that he was speaking sincerely. T. 872. Osmulski earlier had complained about the same issue, the mixing of clean and contaminated tools in the hot tool crib, to John Sutka. T. 869.

Sutka was replaced by new supervisor John Shafer on January 12, 1988. T. 293. After an introductory meeting, Shafer called Mandreger aside and expressed his condolences on the death of Mandreger's mother, which had occurred a week earlier. T. 109. Mandreger testified that during this conversation, Shafer brought up the NRC and told him that reporting to the NRC "makes us look bad." T. 109-110. Shafer maintained that it was Mandreger who brought up the NRC and that he appeared irritated and agitated. T. 630-631. Mandreger testified that a union steward told him that Shafer was accusing Mandreger of yelling at him during the January 12 conversation. T. 111. The steward

denied the accusation and stated that he was on vacation at the time he supposedly told Mandreger about Shafer. T. 469.

The next alleged incident of harassment occurred on Friday, January 22, 1988, when Gardner asked Mandreger his whereabouts for an hour during the day. T. 111. Gardner did not threaten to take disciplinary action, T. 379, but rather, out of concern for getting the work done, sought an explanation for an apparent one hour absence from the work site. T. 760, 839. After Mandreger

explained where he had been and what he was doing, the issue was resolved and the two shook hands and parted. T. 313, 379, 763.

Notwithstanding the amicable resolution of the issue, Mandreger set out to confirm through others that he had been working during the hour in question. T. 132, 314. Mandreger went to Gardner's office, explained the proof of his whereabouts, and told Gardner to "watch [your] p's and q's. . . I got witnesses showing me that I was there on the job, security's got it down . . . you keep this stuff up I'll go to Channel 7, I'll expose you for what you're doing here." T. 133. Mandreger was speaking loudly. T. 764.

Later that day, a union representative informed Mandreger about a meeting with his supervisors concerning his behavior. T. 136, 1003. Mandreger asked the union representative to accompany him to the office of the resident NRC inspector, where Mandreger related the events and complained that he was being harassed by management. T. 136.

At the meeting, Shafer directed Mandreger to punch out for the day, T. 142, and to report to the Employee Assistance Program

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(EAP) the following work day because the supervisors believed that he had an emotional problem. T. 140-142. Mandreger promptly telephoned union official Gary Jamison, complained that Detroit Edison was retaliating against him for filing an NRC report, and said that he had "some information that [would] blow the lid off" the national presidential election that year. T. 1067-1068, 1435. That evening, Mandreger reported to the Michigan State Police the "cement shoes" threat that Sutka allegedly had made seven months earlier. RX 7; T. 1256. Mandreger told the officer that he was working undercover for the FBI and the NRC to report wrongdoings at Fermi 2. T. 1256.

An EAP staff Social Worker, John Nadolski, interviewed Mandreger on January 25, indicated that he believed Mandreger was fine and could return to work, T. 144, and explained that a staff physician's authorization was required. Mandreger then saw Dr. Douglas Smith, a Detroit Edison staff internist, who informed Mandreger he thought there was a problem and referred him to an outside psychiatrist. T. 146-147. Nadolski concurred with the referral. *Id.* Mandreger felt that Nadolski had baited him with an assessment that he was fine in the morning and with agreement to a psychiatric referral a few hours later. T. 147.

Two days later, psychiatrist Gulam Qadir interviewed Mandreger, who requested an extra copy of Qadir's forthcoming written evaluation so that he could use it to apply for employment with the National Aeronautics and Space Administration. T. 1208. Mandreger wore a black raincoat and sunglasses and used a tape recorder during Qadir's evaluation. T. 1203, 1221. Qadir diagnosed bipolar affective disorder, and noted that Mandreger was in the manic phase and had persecutory delusions. T. 1204, 1220, 1222. Qadir recommended that Mandreger take medication (lithium) because without it he could become dangerous to himself or others. T. 1242-43. He explained that persons with the disorder often think they can stop taking the medication when they feel better, but they experience additional episodes of the illness as a result. T. 1243-44.

Qadir testified that is imperative that a patient with bipolar affective disorder consistently take the correct amount of medication, and opined that if such an assurance could be made, Mandreger could return to work. T. 1244. Qadir could not guarantee that Mandreger would take the prescribed level of medication, however, because he totally denied having a problem. T. 1244. Thus, Qadir recommended that Mandreger not return to work in any setting, T. 1207, and that he undergo treatment for bipolar affective disorder.

Smith met with Mandreger on February 8, informed him that he could not return to work, and suggested that he receive treatment for bipolar affective disorder. T. 1269-1270. Smith reported

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that Mandreger was reluctant to admit that he was ill, T. 1269, and asked permission to get an evaluation from a psychiatrist of his own choosing. T. 1271. Smith consented and agreed to take into consideration additional medical opinions. T. 1271-1272.

Mandreger filed the instant complaint under the ERA and a related civil action in a Federal district court in February 1988. See CX 3, order dismissing the civil action.

Mandreger exhibited no behavior indicative of mania or depression during a March 4 visit to Smith. T. 1302. Mandreger saw three additional psychiatrists or psychologists, each of whom gave him a one-page note authorizing his return to work because there was no evidence of psychiatric illness. *E.g.*, RX 6; T. 1272, 1274. Nevertheless, Smith continued to keep Mandreger off work because a bipolar disorder can regress and reappear in a short time if not treated, and Mandreger was not in treatment at the time. T. 1303. A March 11 meeting between Smith and Mandreger ended with Smith agreeing not to reach a final decision on Mandreger's return to work until Mandreger produced a fourth medical opinion. T. 1274.

A few days earlier, Mandreger had consulted an additional psychiatrist, Dr. Gloria Pitts, who provided a one-page opinion letter that he could return to work because psychiatric illness was not demonstrated. T. 1274-1275, 1344-1345. Notwithstanding that letter, Pitts testified that her evaluation of Mandreger was not complete after his first visit. T. 1345.

In late March, while on the way to the union hall to sign a release authorizing Dr. Smith to obtain the medical records from Mandreger's visits to psychiatrists, Mandreger had a psychotic episode. He was found by the police in his hometown in another part of the state. T. 160-161. After finding Mandreger injured and disoriented in a home that he had broken into, the police took him to a hospital emergency room for treatment. T. 162. From there, he was transferred to a mental institution, where he stayed for 17 days and was treated with medication, including lithium, for bipolar affective disorder. T. 164-165; RX 4, p. C46 *et seq.*

Mandreger was released from the mental institution into the care of Dr. Pitts. T. 167. Upon reviewing Mandreger's recent history and hospitalization, Pitts agreed with the diagnosis of bipolar affective disorder and prescribed lithium. T. 1346-1347, 1352. She testified that Mandreger would have to remain on the medication for a long time, possibly his entire life. T. 1348, 1352. Dr. Pitts believes that several factors, including

genetics, personal issues, and employment stresses, triggered Mandreger's bipolar disorder, T. 1355-1356.

During this period, Mandreger exhausted his sick leave and vacation pay, and for about three weeks he received no income.

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T. 154-155. Due to the financial strain, he greatly desired to return to work. T. 153.

Mandreger presented to Dr. Smith a second work release from Dr. Pitts in May 1988. T. 1278; RX 5 pp. 7-8. Smith spoke with Pitts, who agreed that Mandreger should not return to Fermi 2 because it was a stressful work site. T. 1279, 1361, 1379, 1397.

In view of Smith's decision that Mandreger could not return to Fermi 2, and pursuant to the governing collective bargaining agreement, Detroit Edison placed Mandreger in a maintenance position at its non-nuclear River Rouge Power Plant. T. 1439. Mandreger's new position had the same base pay as the former one, T. 1439-1440, but it did not provide as much potential for earning overtime pay or for advancement. T. 175-177. Mandreger considered the new position inferior to his former position at Fermi 2. T. 174.

Some time in June 1988, Mrs. Mandreger informed Dr. Pitts that Mandreger was not taking his prescribed medication, and Pitts confirmed this through blood tests. T. 1348-1349. She last saw Mandreger in June or July 1988. T. 1350.

Dr. Pitts testified that on August 23, 1988, she received notice either from Mandreger's family or his counsel that Mandreger apparently had resigned from employment with Detroit Edison and had disappeared. T. 1353. Dr. Pitts considered these actions to be connected with Mandreger's mental disorder. T. 1353, 1357-1358.

II. Analysis

Under the ERA's employee protection provision, an employer may not discharge or discriminate against an employee because the employee:

(1) commenced, caused to be commenced, or is about to commence a proceeding under [the ERA] or the Atomic Energy Act of 1954 . . . or a proceeding for the administration or enforcement of any requirement imposed under [the ERA] or the Atomic Energy Act of 1954 . . . ;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of [the ERA] or the Atomic Energy Act of 1954

42 U.S.C. § 5851(a) (1988). [2] There is no dispute that

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Mandreger is an employee and Detroit Edison is an employer

subject to the ERA. R.D. and O. at 3, 55.

A. Prima Facie Case

To make a prima facie case, the complainant in a whistleblower case must show that he engaged in protected activity, that the respondent subjected him to adverse action, and that respondent was aware of the protected activity when it took the adverse action. Complainant must also raise the inference that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

Mandreger's internal complaints to managers and to his union steward constituted protected activities under the ERA. See *Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Dec. and Order of Remand, July 19, 1993, slip op. at 11 (protected activities included making internal complaints to management and contacting union representative). The United States Court of Appeals for the Sixth Circuit, whose decisions are controlling in this case, has stated that the ERA's employee protection provision protects internal complaints to management, *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991), and the majority of circuits agree. See *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) (implicit); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985) (explicit), cert. denied, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir.) (explicit); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (implicit). But see, *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (ERA protects only complaints to governmental bodies).

Mandreger's threat to report safety issues to the NRC also was a protected activity. See, e.g., *Couty v. Arkansas Power and Light Co.*, Case No. 87-ERA-10, Final Dec. and Order, June 20, 1988, adopting ALJ R.D. and O. of November 16, 1987, slip op. at 9 (threat to go to NRC is protected under the ERA), *aff'd in relevant part*, *Couty*, 886 F.2d 147. The report Mandreger made to the NRC clearly is protected as well.

The ALJ found that Detroit Edison took adverse action against Mandreger "with respect to his compensation, terms, conditions or privileges of employment when the Complainant was referred to EAP," the Employee Assistance Program. R.D. and O. at 53. I note that the referral itself did not cause any diminution in the terms or conditions of employment.

Rather, the results of referring Mandreger to the EAP constituted adverse action in this case. In view of Dr. Qadir's assessment that Mandreger had bipolar affective disorder and did not accept that diagnosis, Mandreger was not permitted to return

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to work. After his sick leave and vacation days ran out, Mandreger was without pay for a period. The ultimate action Detroit Edison took, transferring Mandreger to the River Rouge plant, placed him in a position in which there was less opportunity to earn overtime pay and, according to Mandreger, less opportunity for advancement. Thus, I find that barring

Mandreger from Fermi 2 and transferring him to River Rouge constituted adverse actions against him.

The ALJ found that Detroit Edison was aware that Mandreger had engaged in protected activities, R.D. and O. at 53, and I agree. Mandreger freely spoke to his managers about having made various complaints to management and to the NRC, and the managers confirmed that they knew Mandreger had made such complaints. T. 630-631 (Shafer), 747, 793 (Gardner). In addition, co-worker Greg Osmulski said that Mandreger's NRC complaint was common knowledge among the hot tool crib workers. T. 854.

The final element of a prima facie case is raising the inference that the complainant's engaging in protected activities motivated the adverse action against him. Temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference. *Couty*, 886 F.2d at 148 (temporal proximity sufficient as a matter of law to establish final element in a prima facie case).

Mandreger complained to his managers about safety issues in October, November, and December of 1987, and formally complained to the NRC in the latter month. He was not permitted to work at Fermi 2 beginning in January 1988, as a result of which he was in a nonpay status for a few weeks in April and May of 1988, and he was transferred to a different position effective May 17, 1988. About six months elapsed between Mandreger's initial internal complaints and the final adverse action, job transfer. I find that Mandreger introduced evidence sufficient to raise an inference that his protected activities likely motivated the adverse actions against him. See *Thomas v. Arizona Public Service Co.*, Final Dec. and Order, Sept. 17, 1993, slip op. at 19 (one year constituted sufficient temporal proximity to raise inference of causation); *Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 11-12, reversed on other grounds sub nom. *Ebasco Constructors, Inc. v. Martin*, No. 92-4567 (5th Cir. Feb. 19, 1993) (passage of seven or eight months sufficient). I therefore find that Mandreger established a prima facie case of a violation of the ERA.

B. Respondent's Burden of Production and the Dual Motive Analysis

Once Mandreger established a prima facie case, the burden shifted to Respondent to articulate a legitimate,

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nondiscriminatory reason for the adverse actions, *Dartey*, slip op. at 8, and Detroit Edison did so. Although I have found that referral to the EAP was not itself an adverse action, it did lead to Detroit Edison's taking adverse actions against Mandreger. I find that Detroit Edison adequately explained the reasons why it made the referral in this case. Various union and management witnesses testified to Mandreger's unusual statements and behavior on the job. For example, Shafer convincingly testified that he was startled by Mandreger's excited and hostile reaction to his mentioning on January 12 that he knew there had been problems with the previous management in the department. T. 630. In addition, Gardner explained that at the end of his initial talk with Mandreger about his whereabouts on January 22,

he considered the matter resolved when Mandreger shook his hand. T. 763. Nevertheless, a few minutes later, Mandreger angrily confronted Gardner and threatened to "go to Channel 7" with news about problems at Fermi 2 simply because Gardner had asked him where he had been between 11 a.m. and noon. T. 764. Detroit Edison had an established program of requiring supervisors to observe employee work behavior and refer to the EAP those who exhibit aberrant behavior. See RX 20, the materials from Detroit Edison's Behavior Reliability Training Workshop, which supervisors are required to attend. T. 1326. Gardner, who reported Mandreger's unusual behavior to his superiors in January 1988, had attended a refresher course in behavior reliability training that month. T. 1335.

Likewise, Detroit Edison proffered a legitimate reason for barring Mandreger from Fermi 2. I find that the inherent danger in a nuclear power plant justifies Detroit Edison's concern with the emotional stability of the employees who work there. See *Rose v. Secretary of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (nuclear power is "one of the most dangerous technologies mankind has invented"). Indeed, the NRC requires licensed operators of nuclear power plants to ascertain employees' emotional stability. T. 1319; see also, RX 19. Dr. Smith's observation of Mandreger's hostility and tendency to jump from topic to topic during the interview on January 22, T. 1267, justified the initial decision to keep Mandreger away from the work site. After Mandreger's hospitalization and the agreed diagnosis of bipolar affective disorder, there was ample reason not to permit Mandreger to return to work at Fermi 2.

When the employer's adverse action against the employee was motivated by both prohibited and legitimate reasons, the dual motive doctrine applies. *Dartey*, slip op. at 8-9; see *Mackowiak*, 735 F.2d at 1163; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). In such a case, the employer has the burden to show by a preponderance of the

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evidence that it would have taken the same action concerning the employee even in the absence of the protected conduct.

Dartey, slip op. at 9; *Mackowiak*, 735 F.2d at 1164; *Mt. Healthy*, 429 U.S. at 287; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion).

The employer bears the risk that the influence of legal and illegal motives cannot be separated. *Mackowiak*, 735 F.2d at 1164; *Guttman v. Passaic Valley Sewerage Comm'rs*, Case No. 85-WPC-2, Final Dec. and Order, Mar. 13, 1992, slip op. at 19, *aff'd sub nom. Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor*, 992 F.2d 474 (3d Cir. 1993).

The strongest evidence of a retaliatory motive on Detroit Edison's part is Gardner's statement that it was wrong for Mandreger go to the NRC because Detroit Edison could have solved the problem about which he complained. T. 95-96. Although Gardner initially testified that he did not believe he ever made such a statement to Mandreger, T. 753, he later conceded that it was possible that he did. T. 807. [3] The ALJ apparently believed that Gardner made the alleged comment because he found

that Gardner's expressed views were "legitimate statements of the employer's view of how employees should more properly present safety concerns. Such comments in the context of this case were not wrongful acts of harassment." R.D. and O. at 56, par. 9 (b). The ALJ did not explain why he viewed Gardner's statement in such a benign light.

I do not agree with the ALJ's assessment of Gardner's statement. I find that Gardner exhibited animus against whistleblowing when he told Mandreger it was wrong to go to the NRC because Detroit Edison could solve the problem.

The other purported instances of harassment or anti-whistleblower statements are another matter, however. Mandreger testified that worker Greg Osmulski said in a laughing, sarcastic tone that Mandreger's going to the NRC was the best thing that ever happened to their group. T. 104. Osmulski testified that he had mentioned several times to managers that tools in the hot crib area needed to be segregated into "clear" and "contaminated," to no avail. After Mandreger's complaint, segregation of the tools became a priority, T. 864, and I agree with the ALJ that Osmulski was sincere when he thanked Mandreger for going to the NRC. T. 872; R.D. and O. at 12, 30.

According to Mandreger, in a January 12, 1988, conversation, manager John Shafer brought up the NRC and said it was wrong to report to the NRC because it made the company look bad. T. 109-110. Shafer testified that it was Mandreger who brought up the NRC, and denied criticizing him for making a report to the NRC. T. 631, 678; R.D. and O. at 23. The ALJ credited Shafer's testimony that it was Mandreger who first mentioned the NRC, but did not resolve the purported criticism of reporting to the NRC.

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R.D. and O. at 23. Rather, the ALJ found that "even if Shafer told Mandreger that going to the NRC was wrong, such a statement was probably more in the nature of a defensive response rather than an attempt to harass or intimate Mandreger." *Id.*

Unlike Gardner, Shafer did not equivocate in his denial of making a statement that it was wrong to go to the NRC. Since the ALJ credited Shafer about who first mentioned the NRC, R.D. and O. at 12, I also credit Shafer's denial that he made the statement that going to the NRC was wrong.

According to Mandreger, manager John Sutka also made the statement that going to the NRC was wrong because it made the company look bad. The ALJ noted the similarity in the statements Mandreger attributed to both Shafer and Sutka, but did not resolve the "confusion as to what Mandreger was told and by whom." R.D. and O. at 32. Although "not particularly impressed with Sutka's overall credibility," the ALJ nevertheless credited Sutka's denial of mentioning the NRC to Mandreger because of "Mandreger's tendency for exaggeration." R.D. and O. at 10. Assuming that Sutka made the criticism, the ALJ found that it was not an act of harassment or intimidation. *Id.* at 32. I agree with the ALJ that it is more plausible that Sutka did not make the critical statement. R.D. and O. at 32. [4]

I further agree with the ALJ that Mandreger showed a propensity to embellish or exaggerate events. R.D. and O. at 54. One example is that Mandreger attributed nearly identical

statements critical of reporting to the NRC to both Shafer and Sutka. Mistaking the sincerity of Osmulski's gratitude for Mandreger's NRC report is another. In addition, on cross-examination, Mandreger recanted the statement he made in a deposition that Gardner had criticized him on 10 to 12 occasions. T. 334.

I find that Mandreger incorrectly assumed that management was watching him closely after his December 7 NRC report. The evidence shows that managers took a closer look at the hot tool crib operation, so as to improve it after Mandreger complained.

Similarly, the evidence shows the rational basis for Gardner's asking Mandreger whether he had any questions at the end of a meeting with the hot tool crib workers. Health Physics technician Dixie Wells corroborated Gardner's testimony that Mandreger had asked several questions, T. 972, and seemed "frightened" at the meeting. T. 972. I therefore agree with the ALJ's finding, R.D. and O. at 56, par. 9(c), that there was no evidentiary support for Mandreger's claim that management overscrutinized his work.

I impute supervisor Gardner's criticism of reporting to the NRC to Detroit Edison, and therefore, I find that the company had an improper motive when it took adverse action against Mandreger.

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It was Gardner's report of Mandreger's odd behavior that set in motion the events leading to the adverse actions against Mandreger.

As explained above, Detroit Edison also had legitimate reasons for barring Mandreger from Fermi 2 and transferring him to the River Rouge plant. Thus, I find that there were mixed motives for Detroit Edison's actions, and the dual motive analysis applies. Detroit Edison had the burden of establishing that even in the absence of Mandreger's protected activities, it would have taken the same adverse actions.

Mandreger argues that his illness was caused by the harassment and intimidation of Detroit Edison's managers because he had engaged in protected activities, and therefore the company has violated the ERA. But the doctors who testified cited several factors as causing the onset of Mandreger's bipolar affective disorder, including work place stress, [5] events in his personal life, [6] and genetics. [7] Several doctors agreed that because of his bipolar affective disorder, Mandreger should not work at a nuclear power plant. T. 1279, 1306-1307 (Smith); 1361, 1379, 1397 (Pitts); and 1207 (Qadir).

The courts have recognized the seriousness of bipolar affective disorder. See, e.g., *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985) (describes attributes of the illness in a handicap discrimination case under the Rehabilitation Act of 1973); *Hogarth v. Thornburgh*, 833 F.Supp. 1077 (S.D.N.Y. 1993) (finds that person diagnosed with bipolar affective disorder is a handicapped individual under Rehabilitation Act of 1973). Evidence in this record supports the courts' assessment of the disorder. Mandreger had a 17-day stay in a mental hospital and will need a lengthy, perhaps lifelong, course of medication. In addition, Mandreger refused to accept the diagnosis of bipolar

affective disorder, [8] did not always take the prescribed medication for it (lithium), [9] and continued to exhibit behavior consistent with the manic phase of bipolar affective disorder well after his hospitalization. [10]

This record shows that work place stress was only one of several factors that precipitated bipolar affective disorder in Mandreger. I am convinced that Mandreger misperceived as directed at him various normal work place activities or concerns that other employees would not have so perceived, and that his whistleblowing did not cause Detroit Edison to single him out.

While there is one instance of a supervisor (Gardner) exhibiting animus against Mandreger for reporting a safety concern to the NRC, there also is overwhelming evidence that Mandreger's work place behavior was aberrant. I find that Detroit Edison established that the requirement for mental stability of the work force at nuclear facilities justifies the

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actions taken against Mandreger, who has a serious mental disorder and has exhibited a tendency not to take consistently the medication prescribed for it. The psychotic episode in March 1988 showed that Mandreger could well be a danger to himself or others if he was not taking medication. [11] I further find that Detroit Edison met its burden of showing that even if Mandreger had not engaged in any protected activities, it would have barred him from work in a nuclear plant and transferred him to a non-nuclear work site because of his aberrant behavior in the work place. Accordingly, the complaint is DISMISSED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]

Sutka testified that although he used the "cement shoes" phrase humorously, he would never direct it as a threat to any individual. T. 1406.

[2]

Section 2902(b) of the Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, amended the employee protection provision for claims filed on or after the date of its enactment, October 24, 1992. See Section 2902(i) of Pub. L. 102-486. Mandreger filed this complaint in 1988, so the 1992 amendment does not apply.

[3]

The testimony of Greg Osmulski that he did not hear Gardner mention the NRC in the conversation with Mandreger on December 9

is not dispositive, since Osmulski overheard only a portion of the Gardner-Mandreger conversation that day. T. 853-854.

[4]

If either Shafer or Sutka had made the statements critical of reporting to the NRC, I would find that the statements were intimidating or harassing.

[5]

Dr. Elissa Benedek testified that due to his illness, Mandreger perceived work as a stressor because he misperceived his supervisors' statements. T. 549. She believed that Mandreger's work was not a stressor in actuality. T. 565.

Dr. Gloria Pitts believed that the triggering event of his illness was when a supervisor questioned Mandreger's whereabouts on January 22, 1988. T. 1355-1356, 1370.

Dr. Richard Feldstein testified in a deposition that harassment at work was a factor in the onset of Mandreger's illness, CX 5 p. 28-31, and that Mandreger's feelings of persecution and harassment were not delusions but rather based on relevant actual events. CX 5 p. 103-04. But Mandreger admitted that the statement he made to Dr. Feldstein that a supervisor criticized him 10 or 12 times about going to the NRC was an exaggeration. T. 334; see CX 5 p. 75. And Mandreger also told Dr. Feldstein that he was going to lose his job, although he conceded that this was his "feeling" and no one ever told him that. T. 336. I agree with the ALJ's decision not to rely heavily on Dr. Feldstein's medical opinion since it was based on "the exaggerated events described by Mandreger." R.D. and O. at 21.

[6]

Dr. Gulam Qadir believed that the triggering event in Mandreger's illness was his mother's death on January 4, 1988, after a long struggle with cancer. T. 1205, 1251-1252. Dr. Benedek cited his mother's recent death, his father's death when Mandreger was 18 years old, his wife's unplanned pregnancy, and his strained relationship with his brother as stresses for Mandreger. T. 499-500, 543-544. However, Dr. Pitts did not agree that the mother's death was "a significant triggering event" in Mandreger's bipolar affective disorder. T. 1357.

[7]

Dr. Elissa Benedek, who agreed with the diagnosis of bipolar affective disorder, cited the genetic background of the illness. T. 504, 543. Dr. Qadir agreed that there is a genetic element in the illness. T. 1242.

[8]

Dr. Benedek testified that even at the time of the hearing, Mandreger demonstrated "lack of insight into the fact that he is ill" despite the fact that "there [were] still signs of a manic illness present," and notwithstanding Mandreger's taking lithium. T. 502. According to Dr. Qadir, Mandreger "totally denied that he was an ill person." T. 1230.

[9]

In response to the question whether she would expect that a person diagnosed with bipolar affective disorder for whom lithium was prescribed would continue to take that drug, Dr. Benedek explained, T. 503:

The problem with this illness is that patients who have it often like the feeling of being hyperenergetic, being high, having quick thinking and so forth. And they often don't like the calming [e]ffect of Lithium, so they are noncompliant. And it sometimes takes a number of episodes of the illness for someone to recognize the need for Lithium. So, there's a denial of illness with this kind of illness.

Dr. Pitts determined clinically that Mandreger was not taking the prescribed course of medication after his transfer to River Rouge. T. 1348-1349.

[10]

When interviewed by Dr. Benedek during the course of the hearing in August 1988, Mandreger continued to exhibit the following manifestations of bipolar affective disorder: rapid speech, pressured speech, flight of ideas, inability to stick to the subject, and lability (or constant change) of affect (or mood). T. 496-498, 502.

[11] See R.D. and O. at 16, Summarizing Mandreger's testimony that he broke into a home because he was cold. See also, RX 4 (complainant's medical records).